AMENDED COMPLAINT AND APPLICATION FOR A THREE JUDGE COURT

To The Honorable, The Judge Of Said Court:

The Complainants herein, by Harry S. Shapiro, their attorney, respectfully say unto Your Honor:

1. That this action is brought under Title 28 of the United States Code.

2. That this matter in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

3. That the Complainants are operators of beauty shops in the State of Maryland, District of Columbia and the State of Virginia respectively and employ beauticians in said cosmetology operation.

4. That Title 26, United States Code, Section 3401, as amended reads as follows:

"CHAPTER 24—COLLECTION OF INCOME TAX AT SOURCE ON WAGES

§ 3401. Definitions.

(a) Wages—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

(1) for active service as a member of the Armed Forces of the United States performed in a month for which such member is entitled to the benefits of section 112; or

(2) for agricultural labor (as defined in section 3121 (g)).

(3) or local chapter of a college fraternity or sorority; or domestic services in a private home, local college club.

(4) for service not in the course of the employer's trade or business performed in any calendar quarter by

an employee, unless the cash remuneration paid for such service is $50.00 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade of business; or

(B) such individual was regularly employed (as determined under subparagraph (a)) by such employer in the performance of such service during the preceding calendar quarter; or

(5) for services by a citizen or resident of the United States for a foreign government or an international organization; or

(6) for services performed by a nonresident alien individual, other than—

(A) a resident of a contiguous country who enters and leaves the United States at frequent intervals; or

(B) a resident of Puerto Rico if such services are performed as an employee of the United States or any agency thereof; or

(C) an individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of Section 101 (a) (15) of the immigration and Nationality Act, as amended, if such remuneration is exempt, under Section 1441 (c) (4) (B), from deduction and withholding under Section 1441 (a), and is not exemption from taxation under Section 872 (b) (3); or

(7) for such services, performed by a nonresident alien individual who is a resident of a contiguous country and who enters and leaves the United States at frequent intervals, as may be designated by regulations prescribed by the Secretary or his delegate; or

(8) (A) for services for an employer (other than the United States or any agency thereof)—

(i) performed by a citizen of the United States, at the time of the payment of such remuneration, it is reasonable to believe that such remuneration will be excluded from gross income under Section 911; or

(ii) performed in a foreign country or in a possession of the United States by a such citizen, at the time of the payment of such remuneration, the employer is required by the law of any foreign country or possession of the United States to withhold income tax upon such remuneration; or

(B) for services for an employer (other than the United States or any other agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico) if it is reasonable to believe that at least 80 per cent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services; or

(C) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within Puerto Rico, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico; or

(9) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(10) (A) for services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution; or

(B) for services performed by an individual in, and at the time of, the sale of newspapers or magazines to

ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back; or

(11) for services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

(12) to, or on behalf of any employee or his beneficiary—

(A) from or to a trust described in section 401 (a) which is exempt from tax under section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust; or

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403 (a); or

(C) under or to a bond purchase plan which, at the time of such payment is qualified bond purchase plan described in section 450 (a); or

(13) pursuant to any provision of law other than section 5 (c) or 6 (1) of the Peace Corps Act, for service performed as a volunteer or volunteer leader within the meaning of such Act; or

(14) in the form of group term life insurance on the life of an employee; or

(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217; or

(16) (A) as tips in any medium other than cash;

(B) as cash tips to an employee in any calendar month in the course of his employment by an employer unless the amount of such tips is $20 or more.

* * * * * *

(f) TIPS—For purpose of subscription (a) the term "wages" includes tips received by an employee in the course of his employment. Such wages shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received. As amended Aug. 9, 1955, c. 681, 69 Stat. 616; September 21, 1961, Pub. L. 87-256 Sec. 110 (g) (1), 75 Stat. 537; Sept. 22, 1961, Pub. L. 87-293, Title II, Sec. 201 (c), 75 Stat. 625; Oct. 10, 1962, Pub. L. 87-792, Sec. (1), 76 Stat. 830; Feb. 26, 1964, Pub. L. 88-272, Title II, Sec. 204 (b), 213 (c), 78 Stat. 36, 52; July 30, 1965, Pub. L. 89-97, Title III, Sec. 313 (d) (1), (2), 79 Stat. 383, 384."

5. That title 26, Sec. 3402 as amended reads as follows:

SEC. 3402 INCOME TAX COLLECTED AT SOURCE

(a) Requirement of withholding—Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsections (j) and (k) a tax equal to 14 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b) (1).

(c) Wage bracket withholding—

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax determined in accordance with the following tables, which shall be in lieu of the tax required to be deducted to be withheld under subsection (a):

* * * * * *

(3) to deduct and withhold upon any payment of wages to such employee during such quarter (and, in

the case of tips referred to in subsection (k), within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted and withheld upon the wages of such employee during such quarter to the amount required to be deducted and withheld during such quarter without regard to this subsection.

* * * * * *

(j) Noncash remuneration to retail commission salesman—In the case of remuneration paid in any medium other than cash for services performed by an individual as a retail salesman for a person, where the services performed by such individual for such person is ordinarily performed for remuneration solely by way of cash commission an employer shall not be required to deduct or withhold any tax under this subchapter with respect to such remuneration, provided that such employer files with the Secretary or his delegate may by regulation prescribe.

(k) Tips.—In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that the tax can be deducted and withheld by the employer, at or after the time such statement is so furnished and before the close of the calendar year in which such statement is furnished, from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer for the purpose of such deduction and withholding) as are under the control of the employer; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (16) (B) of section 3401 (a) is applicable may deduct and withhold the tax with respect to such tips from any wages of the employee (excluding tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20. Such tax shall not at any time be deducted and withheld in an amount which exceeds the aggregate of such

wages and funds (including funds turned over under section 3102 (c) (2) or section 3202 (c) (2) (minus any tax required by section 3102 (a) or section 3202 (a) to be collected from such wages and funds. As amended Aug. 9, 1955, c 666, Sec. 2, 69 Stat. 605; Sept. 21, 1961, Pub. L. 87-256, Sec. 110 (g) (2), 76 Stat. 537; Feb. 26, 1964, Pub. L. 88-272, Title III, Sec. 302 (a), (b), 78 Stat. 140; July 30, 1965, Pub. L. 89-97, Title III, Sec. 313 (d) (3)-(5), 79 Stat. 384; Sept. 29, 1965, Pub. L. 89-212, Sec. 2 (c), 79 Stat. 859.

6. That Circular E Employer's Tax Guide, published by the Internal Revenue Service of the Treasury Department known as Publication # 15 (Rev. Jan. 1966) at Section 6B reads as follows:

What Are Taxable Tips

Beginning January 1, 1966 cash tips received by an employee in the course of his employment by an employer, must be reported by the employee to the employer on or before the tenth day of the month following the month the tips are received. No report should be made for any month in which the tips were less than $20, but otherwise tips should be reported every month regardless of any total of wages and tips for the year. An employee must furnish his employer with a written statement of his tips showing (a) his name, address and social security number, (b) the name and address of the employer, (c) the total amount of tips. Form 4070 may be used for reporting tips and is available at your District Director Office.

Employers must collect both income tax and employee Social Security tax and employee Social Security tax on tips reported by employees from wages due to the employee or from other funds that the employee makes available. The wages or other funds are to be applied first to the Social Security tax and any excess to income tax. Collection of Social Security employee tax should be discontinued when the employee's combined wages and tips total $6,600 for the year. However, the employer's liability for employer tax on wages continues until the wages alone total $6,600

during the calendar year). Income tax withholding applies for the entire year even though the Social Security limits have been reached.

Employers must include in column 20 of Form 941 all tips reported by employees during the quarter (up to $6,600 during the calendar year) whether or not there were available sufficient employee funds to collect the tax. Any employer wishing to report tips on a form separate from that used for wages may use Form 941A Continuation Sheet for this purpose listing the tips in column 20 showing the total of this income in item 22 of Schedule A of Form 941.

If by the tenth day of the month following the month in which an employee's report was received, an employer has not had available sufficient employee funds to permit deduction of the employee tax, the employer is no longer liable for the collection of the tax. The employer will show Form W-2 the amount of the uncollected tax. See section 20.

An employer is not liable for his usual share of Social Security tax on employee tips. Employee tips may not be used by the employer in computing maximum wages subject to the employer's share of Social Security tax.

EXAMPLE: John Smith, a waiter employed by the Ritz Restaurant, receives regular wages of $100 a week. He also receives tips at the rate of $50 per week which he reports to his employer. The employer must pay the employer's share of FICA tax of $5,200 for the year (52 weeks at $100 a week=$5,200). FICA deductions from wages of the employee will cease when his tips and wages combined reach $6,600 for the year.

In making deductions of Income and Social Security taxes on tips, employers are permitted under regulations (to be issued at a later date) that will be reported by the employee in any quarter of the calendar year, (B) determine the amount to be deducted upon each payment of wages (exclusive of tips) during such quarter as if the tips so estimated constituted the actual tips so reported and (C) deduct upon any payment of wages (other than tips)

to such employee during such quarter (and within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted upon such wages of the employee during the quarter to the amount required to be deducted in respect of tips included in written statements furnished to the employer during the quarter."

7. That Circular E, Employer's Tax Guide, published by the Internal Revenue Service of the Treasury Department known as Publication # 15, (Rev. April, 1966) at Section 6B reads as follows:

What Are Taxable Tips

Cash tips received by an employee in the course of his employment by an employer, must be reported by the employee to the employer on or before the tenth day of the month following the month the tips are received. No report should be made for any month in which the tips were less than $20, but otherwise tips should be reported every month regardless of any total of wages and tips for the year. An employee must furnish his employer with a written statement of his tips showing (a) his name, address and social security number, (b) the name and address of the employer, (c) the calendar month or period for which the statement is furnished, and (d) the total amount of tips. Form 4070 may be used for reporting tips and is available at your District Director's Office.

Employers must collect both income tax and employee Social Security tax on tips reported by employees from wages due the employee or from other funds that the employee makes available. Employers must collect both income tax and employee Social Security tax on tips reported by employees from wages (after deduction of employee social security and income tax thereon) due the employee or from other funds that the employee makes available. Collection of Social Security employee tax should be discontinued when the employee's combined wages and tips total $6,600 for the year. Income tax withholding applies for the entire year even though the Social Security limits have been reached.

Employers must include in column 20 of Form 941 all tips reported by employees during the quarter until the tips and other wages reach $6,600 for the calendar year whether or not there were available sufficient employee funds to collect the tax. Any employer wishing to report tips on a form separate from that used for wages may use form 941A Continuation Sheet for this purpose listing the tips in column 20 and showing the total of this income in item 22 of Schedule A of Form 941.

If by the tenth day of the month following the month in which an employee's report was received, an employer has not had available sufficient employee funds to permit deduction of the employee tax, the employer is no longer liable for the collection of the tax. The employer will show on Form W-2 the amount of the uncollected tax. See section 20.

An employer is not liable for his usual share of Social Security tax on employee tips. Employee tips may not be used by the employer in computing maximum wages subject to the employer's share of Social Security tax.

EXAMPLE: John Smith, a waiter employed by the Ritz Restaurant, receives regular wages of $100 a week. He also receives tips at the rate of $50 a week which he reports to his employer. The employer must pay the employer's share of FICA tax on $5,200 for the year (51 weeks x $100 a week=$5,200). FICA deductions from wages of the employee will cease when his tips and wages combined reach $6,600 for the year.

In making deductions of income and Social Security taxes on tips, employers are permitted to estimate the amounts of tips that will be reported by an employee during the quarter of the calendar year and to spread the deductions over the wage payments made during the quarter.

If the estimated tips are less than the actual tips reported to the employer, the additional tax due may be deducted from payments of wages (other than tips) made to the employee during the quarter and within the first 30 days thereafter.

8. That the net result of the aforesaid new law and the instructions thereunder, places a burden upon an employer, who is not the taxpayer, to recover and account for tips that might be received by his employees when such tips were not within said employer's dominion or control and where such tips are not within the existing nor contemplated contractual relationship between the employer and the employee.

9. That the effect of the aforesaid new law to the operations of the Complainants herein is to make obsolete the complex business machines purchased by the Complainants for use in connection with their payroll records and forces the said Complainants to undergo drastic changes in its operations, including the necessity for sustaining great expense for recording and reporting the new information demanded by the Respondents herein as a result of the aforesaid new law and the instructions thereunder.

10. That the procedure outlined by the Respondents under the new law calls for the keeping of two sets of records by the Complainants and necessitates two sets of records pertaining to social security taxes.

11. That the burden placed upon the Complainants by the Respondents under the law and the instructions described in this proceeding makes by force and control, the Complainants a collection agency for the Respondents with reference to the tips in question without compensation for such services; and in effect establishes the Complainants as the agents of the Respondents with full responsibility as if there might be a contractual relationship between the Complainants and the Respondents.

12. That under the Fifth Amendment to the Constitution of the United States, the United States may not confiscate the property of a citizen of the United States or place any undue burdens upon such citizen without "due process of law".

13. That under the existing facts, the aforesaid new law, and the instructions thereunder, the Respondent is attempting to obtain services from and place a burden upon the

Complainants here without compensation and without the guarantees of the Constitution of the United States as amended.

14. That although the Respondents have indicated that the operation of a beauty shop places a burden upon the employer to account for tips as described under the aforesaid new law, the Respondents have not indicated that all persons covered by the language of said law shall be forced to account for such tips.

15. That as a matter of fact, if the law, as presently stated, is valid and enforcible, the Government shall have to be accountable, itself, for gratuities received by Mailmen in the form of cash tips during the month of December for Christmas gratuities; the Milk companies shall have to be chargeable for the tips received by Milkmen during the month of December in each year; Service companies of every kind and description shall have to be chargeable and accountable for tips and gratuities received by certain employees during the month of December in each year; and all employers similarly situated shall be accountable under this law.

16. That such far reaching effects of the new law were never contemplated nor are such effects being considered in the application of such law notwithstanding the clear language covering such situations.

17. That under the Constitution of the United States as amended, each citizen is entitled to equal protection under the Law, and the application of any law upon one citizen, without the same application being applied to any other citizen equally covered by said law, would be a complete and utter disregard for the fundamental protections under our Constitutional system.

18. That in addition, the definition of wages as prescribed by the new law pertaining to "tips" is in direct conflict with other definitions of wages propounded in other sections of the Internal Revenue Laws.

19. That as a matter of fact, on page 6 of Circular E Employer's Tax Guide published by the Internal Revenue

Service of the Treasury Department known as Publication No. 15, (Rev. Jan. 1966) the following definition of wages is cited:

> "Wages paid in any form other than money are measured by the fair value of the goods, lodging, meals, or other consideration given. In payment of services."

20. That the aforesaid quotation cannot be reconciled with the definition of wages concerning "tips" in that the tips received by a beautician in a beauty shop, or by any other service employee, are not things of value paid, in any form by the employer and are not under the control, directly or indirectly of the employer.

22. That the new law, and its new definition for wages, is ambiguous, arbitrary, discriminatory, and invalid under the Constitution of the United States.

23. That the tips received by a beautician in a beauty shop are a private matter, not within the contractual relationship between the employer and employee, and not within the scope of the relationship between the said parties.

24. That to force an employer to have its employee expose his or her income pertaining to tips, would open up an area wherein all employers would be forced to expose all other income earned by its employees; and a construction of the term "tips" in the aforesaid new law could include any gratuity, in cash, received outside the scope of the salary schedule between the employer and the employee, and could include income received from part-time employment outside the beauty shop in question where cash, or tips, or some other such description of value, is received for services rendered.

25. That such forced invasion of privacy by the employer upon the employee caused by legislation of the Federal Government is an illegal restraint upon its citizens, and a direct and complete invasion of privacy guaranteed under law.

26. That for the reasons set forth herein the Complainants submit and aver that the law cited herein pertaining to the burden placed upon the employer to account for the

tips of the employees is an unconstitutional burden which is subject to be restrained and prevented by the courts.

27. That in addition to the burdens aforesaid being attempted to be placed upon the Complainants herein by the Respondents, the Complainants are presently faced with possible criminal and civil penalties and possible responsibility for the taxes of their employees in view of the fact that some of their employees have tendered tax money pertaining to tip income and the Complainants have been refusing to comply with the mandate of the Respondents herein pertaining to the new law described in this proceeding until there shall have been a final judicial determination of the issues raised herein.

28. That the Complainant's present position is one of extreme jeopardy in view of the aforegoing, and unless this Honorable Court shall assume jurisdiction with reference to this matter, the Complainants may suffer severe, substantial and irreparable damages.

WHEREFORE, your Complainants pray that this Honorable Court shall enter an appropriate Order declaring:

(a) That the laws described in the within Complaint are unconstitutional and null and void.

(b) That the aforesaid laws shall be enjoined from being applied in the manner contemplated and in the manner described.

(c) That this Honorable Court shall enter an appropriate Order granting such other and further relief as may be deemed necessary and proper in this cause.

HARRY S. SHAPIRO

253 Equitable Building
Baltimore, Maryland 21202

SA 7-4079

Attorney for Complainants.

APPLICATION FOR A THREE JUDGE COURT

Now come the Complainants herein, by Harry S. Shapiro, their attorney, and in accordance with Title 28, Section 2282 and Section 2284 of the United States Code, hereby request that the issues in the within Amended Complaint be heard and determined by a District Court of Three Judges for the following reasons:

1. That the relief prayed for in the within proceeding involves a prayer for a permanent injunction restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States.

2. That the aforesaid section 2282 and 2284 of the Title 28 of the United States Code require a District Court of Three Judges where the constitutionality of an Act of Congress is involved.

HARRY S. SHAPIRO

253 Equitable Building
Baltimore, Maryland 21202

SA 7-4079

Attorney for Complainants.

MOTION TO DISMISS AND OPPOSITION TO APPLICATION FOR THREE-JUDGE COURT

Now come the defendants, United States of America and Irving Machiz, District Director of Internal Revenue, Baltimore, Maryland, by their attorney, Thomas J. Kenney, United States Attorney for the District of Maryland in opposition to the plaintiff's application for a three-judge court and erroneous joinder of the District Director and move to dismiss the amended complaint for the following reasons:

1. A three-judge court would lack jurisdiction over the defendants.

2. A three-judge court would lack the power to enjoin the collection of federal taxes.

3. A three-judge court would lack the power to render a declaratory judgment with respect to federal taxes.

4. The amended complaint fails to state a claim upon which relief can be granted.

5. The plaintiffs lack standing to bring this action.

6. This action does not constitute a case of controversy.

7. The District Director of Internal Revenue is not a proper party to this action.

8. The statutes complained of are patently constitutional on their face and in any manner in which they could be applied to the plaintiffs.

A hearing is respectfully requested.

THOMAS J. KENNY,
United States Attorney

RONALD T. OSBORN,
Assistant United States Attorney

JAMES H. JEFFRIES, III,
Department of Justice,
Washington, D. C. 20530.
Trial Attorney Tax Division

ANSWER TO MOTION TO DISMISS

Now come the Plaintiffs, by Harry S. Shapiro, their attorney, and in answer to the Motion to Dismiss and Opposition to Application for Three-Judge Court, respectfully say unto Your Honor:

1. Answering paragraph # 1 of the Defendants' Motion, your Respondents say that Title 28, Section 2282 and 2284 of the United States Code specifically authorizes the within proceeding.

2. That Answering # 2, your Respondents say that in the event that the Federal Law referred to in the within proceeding is deemed to be unconstitutional, then, such law would be null and void and subject to an injunction pertaining to any enforcement under such law.

3. Answering ¶ 3, your Respondents say that the aforesaid Section 2282 and 2284 of Title 28 of the United States Code clearly granted power to a Three-Judge Court to make determination requested in the within proceeding.

4. Answering paragraphs ¶ 4 and 8 inclusive, your Respondents deny the allegations set forth therein.

HARRY S. SHAPIRO,

253 Equitable Building
Baltimore, Maryland 21202

SA 7-4079

Attorney for Plaintiffs-Respondents.

MEMORANDUM OPINION OF THE TRIAL COURT

Filed: May 12, 1967.

Harry S. Shapiro, Baltimore, Maryland, for plaintiffs.

Thomas J. Kenney, United States Attorney, Ronald T. Osborn, Assistant United States Attorney, Baltimore, Maryland, and James H. Jeffries, III, Tax Division, Department of Justice, Washington, D. C., for defendants.

Northrop, District Judge

The plaintiffs, Maryland, Virginia, and District of Columbia corporations who employ beauticians in the operation of their beauty salons, seek to have this court declare Sections 3102(a)[1] and (c)[2] and 3402(k)[3] of Title 26 of the United States Code unconstitutional and to enjoin the United States and the District Director of Internal Revenue of Maryland from enforcing them. The plaintiffs allege that these provisions and the Internal Revenue Service regulations pursuant thereto[4] are ambiguous, arbitrary, discriminatory, invalid, and offensive to the Fifth Amendment of the Constitution as an undue burden on the employer, an uncompensated taking of property, and an invasion of the employee's privacy. The plaintiffs have requested that a three-judge court be convened pursuant to 28 U.S.C. §§ 2282 and 2284. The defendants oppose a three-judge court and move that the complaint be dismissed.

The Internal Revenue Code provisions in question require an employer to receive reports from employees who are recipients of $20.00 or more in tips in each calendar month in the course of their employment to withhold federal income and social security taxes on the amount of tips reported to the extent of the employee's funds within the employer's control, to accept from the employee any tender of money to pay his federal income and social security taxes when the employee's funds within the employer's control are insufficient, and to account for such withheld taxes and money paid over to him by an employee to the United States.

The United States contends that as a sovereign, it cannot be sued without its consent. It further contends that it has not given its consent to be sued in this case. In 1966 Congress provided a civil action against the United States by persons other than the taxpayer when the United States has caused a levy for taxes to be made on property which belongs to one other than the taxpayer, 26 U.S.C., § 7426. The plaintiffs herein are not the taxpayers. Rather, they are acting as collection agents for the United States. Since the Government has made no levy for another person's taxes on any property that belongs to the plaintiffs, 26 U.S.C., § 7426 is not available to them.

The plaintiffs have failed to show where the United States has otherwise given its consent to be sued in a case like this. Therefore, the contention of the United States that the acion against it is barred by its plea of sovereign immunity is valid. Chief Justice Marshall in United States v. Clark, 33 U.S. 436, 8 L.Ed. 1001, at 1004 (1834) said:

> "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

See also United States v. Lee, 106 U.S. 196, 1 S.Ct. 240 (1882); Zager v. United States et al., 256 F.Supp. 396 (E.D. Wis. 1966); and Hart and Wechsler, The Federal Courts and the Federal System 316, 1140-61 (1953). When the United States has not consented to be sued, dismissal

of the action is required as to the United States. Stout v. United States, 229 F.2d 918 (2d Cir.), cert. denied 351 U.S. 982, 76 S.Ct. 1047 (1956). Therefore, the court dismisses the complaint as to the United States.

When the plaintiffs filed their amended complaint, they joined the District Director of Internal Revenue of Maryland as a party defendant. Insofar as the plaintiffs from Virginia and the District of Columbia are concerned, it is doubtful that there could be any case or controversy between them and the District Director of Internal Revenue of Maryland unless they pay their taxes in Maryland. While there is no indication where they pay their taxes, this court will treat them as the Maryland plaintiff.

The District Director contends that he is not a proper party defendant because any judgment entered against him would be the same as if it were entered against the United States. The Supreme Court has held that an officer of the United States may be enjoined from enforcing an unconstitutional statute. Further, it has held that an action against an officer of the United States to enjoin him from enforcing an unconsitutional statute is not a suit against the United States. Thus, the plea of sovereign immunity is not available to an officer of the United States when one seeks to enjoin him from enforcing an unconstitutional statute. Larson v. Domestic & Foreign Commerce, 337 U.S. 682, 69 S.Ct. 1457 (1949); North Carolina v. Temple, 134 U.S. 32, 10 S.Ct. 509 (1890). See also Zager v. United States et al., *supra*. The 1966 amendments to 26 U.S.C., § 7426 do not change the law except where this section is applicable. Since this section is not applicable, the District Director is a proper party to this case.

Two questions are presented: (1) Does the court have the power to enjoin the collection of federal taxes? (2) Does the court have the power to hear a motion for a declaratory judgment as to the constitutionality of a federal tax statute?

With regard to the first question, 26 U.S.C., § 7421(a), as amended in 1966, provides:

"Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment of collection of any tax shall be maintained in any court by any person, *whether or not such person is the person against whom such tax was assessed.*"
[emphasis supplied]

The language of this section is mandatory and prohibits the court from granting injunctive relief unless the plaintiffs bring themselves within the statutory exceptions (not here applicable) or within the equitable exception that the Supreme Court carved out in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 82 S.Ct. 1125 (1962). In *Enochs,* the Court said that a federal district court had the power to enjoin the collection of taxes where the tax is in reality no tax, but an attempt to regulate an area which the Congress has no power to regulate. The plaintiffs here make no *Enochs* contention, but rather claim that Congress cannot make them tax-collecting agents for the government without just compensation. The *Enochs* exception is further inapplicable because the United States is seeking presently no more than to assure the prompt collection of lawful revenue[5].

The plaintiffs have made some claim that the 1966 amendment to 26 U.S.C., § 7421(a) which relates to suits by non-taxpayers, is not applicable to this case because it was filed before the amendment became law. Congress has the power to withdraw from this court the jurisdiction to hear a case at anytime while the case is in progress. Ex Parte McCardle, 7 Wall. 506, 19 L.Ed. 264 (U.S. 1869); Glidden Co. v. Zdanok, 370 U.S. 530, at 567-68, 82 S.Ct. 1459, at 1481-82 (1962), and cases cited therein. But we need not reach the thorny question of the power of Congress over this court's jurisdiction because the law before this amendment does not aid the plaintiffs' cause. Before its enactment some courts allowed non-taxpayers to bring suits to enjoin the district director from collecting federal taxes after final letters for the payment of the tax had been sent to the taxpayer, but before any liens had been filed against the third party's property. Tomlinson v. Smith, 128 F.2d 808

(7th Cir. 1942); Hoye v. United States et al., 109 F.Supp. 685 (S.D. Calif. 1953). In this case, however, no action has been taken by the Internal Revenue Service against the plaintiffs. Therefore, the plaintiffs still have no standing to sue. It thus follows that this court is without power to enjoin the District Director of Internal Revenue of Maryland from enforcing the contested provisions of the Internal Revenue Code.

As to the second question, 28 U.S.C., § 2201 provides:

> "In a case of actual controversy within its jurisdiction, *except with respect to federal taxes,* any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [emphasis added.]

In Martin v. Andrews, 238 F.2d 552 (9th Cir. 1956), the court said that this section prevented a court from rendering a declaratory judgment with respect to federal taxes even when the constitutional validity of the tax was in question. In Martin, the taxpayer was the plaintiff. In the instant case, the plaintiffs are acting only as the collector of the taxes. However, this distinction is without merit because the statute is explicit that no federal court may render a declaratory judgment with respect to federal taxes. The courts in *Tomlinson, supra, and Hoye, supra,* read into this section the same exception that they read into 26 U.S.C., § 7421(a). In *Tomlinson, supra,* at 811, the court said:

> "[I]t is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collection of a tax."

The court believes that 26 U.S.C., § 7421(a) and 28 U.S.C., § 2201 must be read together. In other respects *Tomlinson* and *Hoye* are not applicable here because the 1966 amendment to 26 U.S.C., § 7421(a) casts a shadow on the results

reached in those cases and puts in doubt their continuing validity as representing the law today and because of the factual distinctions noted above. The court, therefore, decides that it has no power to declare the rights of the parties in this case under 28 U.S.C., § 2201.

The plaintiffs have requested the convening of a three-judge court pursuant to 28 U.S.C., §§ 2282 and 2284. Only a three-judge court has the power to enjoin the enforcement of a federal statute on the ground that it is repugnant to the Convention. Section 7421(a) of Title 26, United States Code, is as applicable to a three-judge district court as a single-judge district court. The result is that a three-judge court has no power to grant an injunction in this case. Therefore, the court denies the plaintiffs' requests to convene a three-judge court.

Inasmuch as this court is without jurisdiction to hear the plaintiffs' case and to grant the relief sought and inasmuch as the plaintiffs have failed to show that a three-judge court would have jurisdiction to hear the case and grant the relief sought, the defendants' motions to dismiss the complaint and to oppose the application for a three-judge court are hereby granted, all this 12th day of May, 1967.

EDWARD S. NORTHROP,
United States District Judge

JUDGMENT OF TRIAL COURT

There was entered on the docket May 15, 1967 a judgment which was therein more particularly set forth.

WILFRED W. BUTSCHKY,
Clerk.

JUDGMENT OF U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,569

Jules Hairstylists of Maryland, Inc., a Maryland Corporation; and Jules Hairstylists, Inc., a District of Columbia Corporation; and Jules Hairstylists of Virginia, Inc., a Virginia Corporation,
Appellants,

versus

United States of America and Irving Machiz,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. EDWARD S. NORTHROP, DISTRICT JUDGE.

(Argued January 8, 1968. Decided January 12, 1968.)

Before BOREMAN AND WINTER, Circuit Judges, and MERHIGE, District Judge.

Harry S. Shapiro for Appellants, and Karl Schmeidler, Attorney, Department of Justice, (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Crombie J. D. Garrett, Attorneys, Department of Justice, and Stephen H. Sachs, United States Attorney, on brief) for Appellees.

PER CURIAM:

We affirm on the memorandum opinion of the district court.[1]

Affirmed.

(Decided January 12, 1968.

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[1] Jules Hairstylists of Maryland v. United States, 268 F.Supp. 511 (D.C. Md. 1967).